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LIABILITY OF SAVINGS BANKS FOR PAYMENTS MADE TO WRONG PERSONS PRESENTING A DEPOSITOR'S PASS-BOOK.—In *Kingsley* v. *Whitman Savings Bank*, 65 N. E. 161 (1902), a by-law of the bank provided that the bank would not be responsible for loss where a depositor had not given notice that his pass-book had been lost or stolen if the deposit shall have been paid upon presentation of the book. The bank paid money to one presenting the pass-book and forged orders purporting to be signed by the depositor, and when sued by the depositor, contended it was not liable to him under the provisions of the by-law. The Supreme Judicial Court of Massachusetts, after considering some of the leading decisions, held, however, that the bank had no authority to make the payments, that the by-law authorized a payment to one who falsely personated the depositor in presenting the book, but not to one who falsely claimed to act under the authority of the depositor. The meaning and significance of the by-law was the chief subject in the court's consideration of the case.

Most all savings banks have by-laws intended to protect the institution where it pays out money to one presenting the pass-book issued by the company. These rules are generally printed in the book and constitute the contract between the bank and the depositor. The language of these rules is very different in different banks, but the object of them is, nevertheless, the same in all cases. Although it would be impracticable to give here all the by-laws so used, it seems proper to quote two of the commonest forms: "Although the bank will endeavor to prevent fraud and impositions, yet all payments to persons producing the pass-books issued by it shall be valid payments to discharge the bank;" another form often used is: "As the officers of the bank may be unable to identify every depositor, the bank will not be responsible for loss sustained where a depositor has not given notice of his book being lost or stolen, if such book be paid in whole or in part on presentment."

By-laws of this kind, although protective in their nature, do not allow the bank to act carelessly and recklessly; they do not relieve the bank from the duty of acting "in good faith and with reasonable care." *Brown* v. *Savings Bank*, 67 N. H. 549 (1893); *Ladd* v. *Savings Bank*, 96 Me. 510 (1902); *Gearns* v. *Savings Bank*, 135 N. Y. 557 (1892); *Levy* v. *Bank*, 117 Mass. 448 (1875). The question of due care and diligence is one of law or fact depending upon whether the evidence is conclusive or debatable, *Allen* v. *Savings Bank*, 69 N. Y. 314 (1877), although ordinarily the question should be submitted to a jury. *Brown* v. *Bank*, 67 N. H. 549 (1893). Some banks, by a provision in their by-laws, agree to use their "best efforts to prevent fraud," and in such case the bank must exercise *more* than ordinary care. *Allen* v. *Savings Bank*, 69 N. Y. 314 (1877). Numerous cases could be cited to illustrate what constitutes reasonable care and diligence, but authorities are of little help on a question of this kind, since each case has to be decided upon its own particular facts. The following things have been held to be evidence of negligence: (*a*) failure to adopt proper means of identification, *Ladd* v. *Bank*, 96 Me. 510 (1902), *Brown* v. *Bank*, 67 N. H. 549 (1893); (*b*) failure to institute inquiry, *Gearns* v. *Bank*, 135 N. Y. 557 (1892), *Brown* v. *Bank*, 67 N. H. 549 (1893); and (*c*) failure to notice an apparent dissimilarity between signatures, *Appleby* v. *Bank*, 62 N. Y. 12 (1875). It has been held, however, that the burden is on the plaintiff to show the negligence on the part of the bank. *Israel* v. *Bank*, 9 Daly (N. Y.) 507 (1881).

The next question which naturally arises is, what is the effect of the negligence of the depositor in the care of his book? Several well-considered cases support the view that this, of itself, does not affect the liability of the bank. In *People's*

Savings Bank v. *Cupps*, 91 Pa. 315 (1879), the court considered it immaterial whether plaintiff was negligent in the care of his book or not, and said, "It was a case of mispayment contrary to the published rules." In *Ladd* v. *Savings Bank*, 96 Me. 510 (1902), the court held that negligence of a depositor in losing his book does not excuse the officers of the bank from the exercise of reasonable care in taking precautions to prevent payment to an impostor, and that this is true notwithstanding the existence of a by-law in effect requiring immediate notice to the bank by the depositor of the loss of his book. In *Geitelsohn* v. *Bank*, 17 Misc. (N. Y.) 574 (1896), the Supreme Court said: "The introduction of the rule as to contributory negligence is a novelty in these cases."

Having noted these general principles, let us see under what circumstances the question of the bank's liability comes up. Nearly all the cases may be divided into two classes:

1. Where, as in *Kingsley* v. *Savings Bank*, *supra*, the bank pays to one presenting an order, purporting to be signed by the depositor, and the depositor's pass-book, and

2. Where the bank pays to one personating the depositor and presenting the depositor's pass-book.

In Massachusetts, as we have seen, the courts draw a sharp line of distinction between these two classes of cases. In the first class of cases, *Kingsley* v. *Savings Bank* represents the law and they hold the bank liable. In *Levy* v. *Bank*, 117 Mass. 448 (1875), a by-law was similar to that in the above case except that it contained the following additional clause: "In all cases, a payment upon presentation of a deposit book shall be a discharge to the corporation for the amounts so paid." The court held that this clause enlarged the by-law to such an extent as to "protect the bank if it, using reasonable care and in good faith, upon the presentation of the book paid the plaintiff's deposit, although the book had been stolen and an order purporting to be signed by the depositor forged."

In a Connecticut case, *Eaves* v. *Bank*, 27 Conn. 229 (1858), where a bank paid to a person presenting the pass-book and also a forged order, the court held the bank liable, saying, "A forged power of attorney is no power of attorney at all, and the presentation of the bank book alone is of no greater effect, for the book is not negotiable." But in *Schoenwald* v. *Bank*, 57 N. Y. 418 (1874), on a similar state of facts, the court held that the bank was authorized to pay upon presentation of the book without an order from the depositor, and the fact that the order was forged was immaterial. This case, however, has been "distinguished" and "limited" by *Allen* v. *Bank*, 69 N. Y. 314 (1877), and by *Smith* v. *Bank*, 101 N. Y. 58 (1885), and its value at the present day may well be questioned.

In Pennsylvania there are but two cases in point. In *Burrill* v. *Dollar Savings Bank*, 92 Pa. 134 (1879), one of the rules of the bank was the following: "If any person shall present a deposit book at the office of this corporation, and allege himself or herself untruly to be the depositor named therein, and shall thereby obtain from the officers of this corporation the amount deposited or any part thereof, and the actual depositor shall not have given previous notice at the office of his or her book having been lost or taken from him or her, this corporation will not be responsible for the loss so sustained by any depositor, neither will this institution be liable to make good the same. Provided that such payment has been entered in the book of the depositor at the time when made." The book of a depositor was temporarily extracted from his trunk, an order was forged, and certain moneys were drawn from the bank without his knowledge. He afterwards brought suit for the amount and it was contended that the above rule relieved the bank from liability. The court *held* that the rule of the bank was reasonable and necessary for its safety, and that plaintiff could not recover, and further held that the fact that plaintiff was illiterate and could not read the rules in the book delivered to him made no difference. In *People's Savings Bank* v. *Cupps*, 91 Pa. 315 (1879), where a bank paid out money on forged orders and these orders were not witnessed, as the by-laws required the orders of absent depositors to be, the court held the bank liable.

In the second class of cases, where a bank pays to one presenting the pass-book and personating the depositor, there is a disagreement among the authorities as to the liability of the bank. In Massachusetts, the courts deem the banks not liable, if they have used reasonable care and diligence in making the payments. *Goldrick* v. *Bank*, 123 Mass. 320 (1877); *Kimins* v. *Bank*, 141 Mass. 33 (1886). The Supreme Court of Maine was of the same opinion in *Sullivan* v. *Institution of Savings*, 56 Me. 507 (1869).

In *Smith* v. *Bank*, 101 N. Y. 58 (1885), the Court of Appeals of New York, speaking through Mr. Chief Justice Reeger, said: "Such a pass-book is not negotiable paper and its possession constitutes, in itself, no evidence of a right to draw money thereon." The court were of opinion that the by-laws contemplated but two modes of payment, one to depositor personally and the other upon his written order, both requiring the presentation of the pass-book as a condition thereof; and it did not authorize or protect the bank in a payment to a stranger whose only evidence of authority to receive it was the possession of the pass-book. This case, however, is criticised in a later New York decision, *Geitelsohn* v. *Bank*, 17 Misc. (N. Y.) 574 (1896), where the Supreme Court says: "But this (referring to the above quotation from *Smith* v. *Bank*)

excludes the effect of the rules taken in connection with the possession of the book." As we have seen, possession of the book, when there is no fact or circumstance to excite suspicion or inquiry and when customary and ordinary means of identification are employed, justifies payment to the holder."

The Supreme Court of Rhode Island takes the same view as the Massachusetts courts and as the Supreme Court of New York took in the last-mentioned case; and in *Palmer* v. *Institution for Savings*, 14 R. I. 68 (1885), Mr. Justice Matteson, speaking for the appellate court, said: "The possession of the book would afford a strong presumption that the person presenting it was authorized to receive the money." In a very recent New Jersey case, *Cosgrove* v. *Institution for Savings*, 64 N. J. L. 653 (1900), where a by-law provided that "Deposits and dividends shall be drawn out only by the depositors in person, or by their written order, or by some person legally authorized and only upon production of the depositor's book, that such payments may be entered therein, and all payments to persons who present the deposit book shall be valid payments to discharge the bank and its officers, the court *held*, that a payment made by the bank in good faith and in the exercise of due care to any person who produces the pass-book, operates to discharge the bank without regard to whether or not such person is entitled to draw the money.

The cases cited in this paper are the leading decisions upon this subject, and it is readily seen that they do not all harmonize in their results. In summarizing, however, it may be said that in nearly all the cases the courts have adopted practically the same considerations in rendering their decisions. They recognize the bank's power to make by-laws to govern their liability and agree that these by-laws, when agreed to by the depositor either actually or constructively, constitute the contract between the parties; they hold that, notwithstanding these by-laws, the banks must use reasonable care and diligence, and if such is not used, the banks are liable for mispayments. As the by-laws constitute the contract between the parties, the courts, in the decision of each case, try to give due effect to the provisions of the particular by-laws, and at the same time try to afford as much protection to the depositor as is consistent with their interpretation of the contract. This is the general attitude taken by the courts in deciding questions of this kind, and when we consider that the by-laws in the various cases so often are differently worded and have different significations, we can readily understand that there is bound to be some diversity in the decisions, since each case has been decided upon the language and meaning of the particular by-laws and upon its own particular state of facts.

E. L. G.